March 2017

NEWS ROUND UP

A Morrison & Foerster summary of recent developments affecting Israeli companies active in the capital markets.

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Changes Afoot?

President Trump has issued a number of orders that have as their aim reducing regulatory burdens. For example, there is the January 30, 2017 "two for one" order, which contemplates that, for each new rule issued by an executive department or agency, *two* regulations would need to be identified for elimination. The order can be found at the following link: https://goo.gl/yLgTKZ.

Subsequent guidance issued on February 2, 2017 clarified that independent agencies, such as the U.S. Securities and Exchange Commission (the "SEC") are not covered by the order. In addition, the original order does not cover "self-regulatory organizations," such as FINRA. This interim guidance can be found at: https://goo.gl/YlcmL5.

Nonetheless, the Acting Chair of the SEC has moved forward to revisit a number of provisions regarded as "burdensome" by some. You may follow the sequence of orders and the scope of their coverage by accessing our timeline, available here: https://goo.gl/pqoefM.

EGC Corporate Governance Practices: A Survey and Related Resources

During 2016, there were relatively few companies that completed initial public offerings ("IPOs"). Some commentators attribute the dearth of IPOs in 2016 to volatility arising from, among other things, Brexit and the U.S. Presidential election. Others point to the continuing trend of successful companies remaining private longer and continuing to benefit from attractive valuations in private financing rounds without facing the burdens associated with becoming SEC-reporting companies. In this year's survey, we consider the characteristics of the emerging growth companies ("EGCs") that completed IPOs and the corporate governance, compensation and other practices adopted by them.

Domestic Versus Foreign. In the aggregated data for year ended December 31, 2016, of the 100 EGCs we reviewed, 26 were FPIs.

FPI Country of Incorporation. The largest percentage of FPI EGCs, or 46.2%, were companies incorporated in the Cayman Islands. Based on the sample surveyed, seven of the 12 Cayman Islands issuers were based in China. The next largest percentages were incorporated in Bermuda, The Netherlands, the Republic of the Marshall Islands and Switzerland, at 7.7% each.

Securities Issued by FPIs. Of the 26 FPI EGCs, 42.3% issued common or ordinary shares directly to investors in the IPO, 42.3% issued American Depositary Receipts ("ADRs"), 3.8% issued both common or ordinary shares and ADRs, and 11.5% issued other types of securities such as warrants. Of the 12 FPIs that issued ADRs, seven were incorporated in the Cayman Islands.

Dual Listings. Approximately 12.0% of the FPI EGCs were listed on both a foreign exchange as well as a U.S. exchange.

Securities Exchange. Of the 12 FPI EGCs that issued ADRs, two were listed on the Nasdaq Capital Market, two were listed on the Nasdaq Global Market, six were listed on the Nasdaq Global Select Market and two were listed on the NYSE.

Dual Classes of Stock. Twenty-six of the EGCs we reviewed had dual classes of common stock, including three issuers that had more than two classes of common stock. Eleven of the dual-class EGCs were FPIs.

Benefits. FPIs that are EGCs will continue to be entitled to all of the other disclosure benefits available to them as FPIs (such as, for example, reduced compensation disclosure requirements, if permitted by home country practice).

Our objective is to provide data that will be useful to you in assessing whether your company's current or proposed corporate governance practices are consistent with EGC market practice. To access our full EGC Corporate Governance Survey, visit: https://goo.gl/Ph8WJC. To order a print copy, please e-mail cjuarez@mofo.com.

Anticipating and Addressing SEC Comments on Non-GAAP Financial Measures

The use of non-GAAP financial measures by public companies continues to be an area of growing concern for the SEC. Since the staff of the SEC's Division of Corporation Finance (the "Staff") released its updated Compliance and Disclosure Interpretations on May 17, 2016 on the use of non-GAAP financial measures (the "Updated C&DIs"), the Staff has issued more than 200 comment letters related to non-GAAP financial measures that have become publicly available.

There are common themes or areas of concern identified by the Staff in these comment letters, as well as responses given by registrants. Senior members of the Staff have commented on the important "critical gatekeeper" role audit committee members play in ensuring credible and reliable financial reporting, including compliance with the Updated C&DIs. There have also been industry initiatives aimed at improving the dialogue among management, audit committee members, external auditors and other stakeholders with respect to the use and disclosure of non-GAAP financial measures.

For additional discussion and analysis, read our practice pointers: https://goo.gl/Y54mN7.

Securities Liability and Treatment of ADRs

Section 10(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), is an anti-fraud provision designed to address a wide variety of manipulative and deceptive activities that can occur in connection with the purchase or sale of a security, including ADRs that may be sponsored or unsponsored by a FPI. In order to establish a civil liability claim under Section 10(b), the plaintiff must establish: (1) the use of the mails or instrumentalities of interstate commerce; (2) the purchase or sale by the plaintiff of the security; (3) the use of a manipulative, or deceptive device by the defendant; and (4) the intent of the defendant to deceive, manipulate or defraud. In the past, the extraterritorial application of Section 10(b) hinged on the application by courts of two tests: the "conduct test" (Section 10(b) applied if a sufficient level of conduct occurred in the United States, even if the injured investors or the purchases and sales were overseas) and the "effects test" (Section 10(b) applied if conduct occurring overseas caused foreseeable and substantial harm to U.S. interests). However, in *Morrison v. National Australia Bank Ltd.*, the U.S. Supreme Court rejected both the conduct test and the effects test and adopted a new "transactional test." Under the transactional test, Section 10(b) does not apply extraterritorially and only applies to transactions in securities listed on domestic exchanges and domestic transactions in other securities.

Several courts have since clarified the scope and applicability of *Morrison*. For example, on January 4, 2017, the U.S. District Court for the Northern District of California held in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation* that sponsored, but unlisted, ADRs in the United States could still constitute a "domestic transaction" for purposes of establishing securities claims in the United States. Sponsored ADRs, which may be listed or unlisted, are issued by a depositary bank that has an agreement with the FPI that it will be the only designated depositary bank acting as transfer agent for the ADRs in the U.S. market (most ADR programs are sponsored programs). In contrast, unsponsored ADRs, which generally trade over-the-counter, are issued by depositary banks that have no formal agreement with the FPI to trade the ADRs in the U.S. market.

SEC Adopts Final Rules Regarding Intrastate and Regional Offerings

On October 26, 2016, the SEC adopted final rules regarding intrastate and regional offerings. The final rules amend Rule 147 ("Rule 147") under the Securities Act of 1933, as amended (the "Securities Act"), to facilitate offerings relying upon recently

adopted intrastate crowdfunding exemptions under state securities laws. Rule 147 provides a safe harbor for intrastate offerings exempt from registration pursuant to Section 3(a)(11) of the Securities Act ("Section 3(a)(11)"), which exempts any security offered and sold only to persons resident within a single state or territory by an issuer residing or incorporated in and doing business within such state or territory. As amended, Rule 147 will continue to function as a safe harbor under Section 3(a)(11), though Section 3(a)(11) will still be available as a potential statutory exemption in and of itself.

The final rules also establish a new Securities Act exemption, designated Rule 147A, that further accommodates offers accessible to out-of-state residents and companies that are incorporated or organized out-of-state.

The final rules also amend Rule 504 ("Rule 504") of Regulation D under the Securities Act ("Regulation D") to (1) increase the aggregate amount of securities that may be offered and sold in any twelve-month period from $1 million to $5 million; and (2) disqualify certain bad actors from participating in Rule 504 offerings. In addition, the final rules repeal Rule 505 of Regulation D, which had provided a safe harbor from registration for securities offered and sold in any twelve-month period from $1 million to $5 million.

For additional discussion and analysis, read our client alert: https://goo.gl/EHmLhS.

EU Market Abuse Regulation Market Soundings Safe Harbour

If you have a class of securities listed or traded on an exchange in the EU, you should become familiar the EU Regulation on Market Abuse ("MAR"). MAR prohibits a person from unlawfully disclosing inside information relating to securities within the scope of the legislation. An unlawful disclosure is made when a person possesses inside information and discloses it to any other person, except in the normal exercise of their employment, profession or duties.

MAR applies to financial instruments:

(a) traded (or which have applied to trade) on a regulated market in an EU Member State;

(b) traded (or which have applied to trade) on a multilateral trading facility ("MTF");

(c) traded on an organized traded facility ("OTF"); or

(d) the price or value of which depends on or has an effect on the price of a financial instrument referred to in (a), (b) or (c) above, including derivative instruments.

The legislation applies to actions and omissions in the EU and in a third country; so, for example, a U.S. investment bank performing market soundings (or "wall crossed" discussions) on behalf of an issuer subject to MAR will need to comply and be aware of the requirements summarized above.

For additional discussion and analysis, read our practice pointers: https://goo.gl/JlH09h.

Capital Acquisition Brokers: New Category of Broker-Dealers Provides Limited Relief for Some Investment Banking Boutiques

The SEC approved a set of Financial Industry Regulatory Authority ("FINRA") rules which creates a new category of broker-dealers known as capital acquisition brokers ("CABs"). The CAB rules were originally proposed in 2014 and will go into effect on April 17, 2017. The CAB rules are intended to provide regulatory relief for broker-dealers that limit their activities to investment banking. However, the relief provided is limited, and the constraints on what business may be conducted by a CAB may diminish the interest of many broker-dealers in using this new category.

FINRA has historically applied a single set of requirements for all broker-dealers. Many of these rules make little sense when applied to broker-dealers that limit their business to M&A advisory work or corporate financing transactions. For example, many FINRA rules are designed to protect retail customers who buy and sell securities through their broker-dealer. While the SEC Private M&A No-Action letter provided some relief, it does not apply to firms providing corporate financing services or M&A services for public companies.

For additional discussion and analysis, read our practice pointers: https://goo.gl/SCY3SV.

SEC Issues Inline XBRL Proposed Rule and IFRS Taxonomy

On March 1, 2017, the SEC proposed the use of the Inline XBRL (eXtensible Business Reporting Language) format for the submission of operating company financial statement information and certain mutual fund information. Inline XBRL allows filers to embed XBRL data directly into an HTML document. With Inline XBRL, filers need to tag the required disclosures using the applicable taxonomy. The tagging would be performed within the HTML document instead of a separate XBRL exhibit. The objective of using Inline XBRL is to improve the data available to investors and other market participants. The proposed Inline XBRL requirements for financial

statement information would apply to all operating company filers, including smaller reporting companies, EGCs, and FPIs that are currently required to submit financial statement information in XBRL. The proposed Inline XBRL requirements would be phased in based on the category of filer.

On March 1, 2017, the SEC also made International Financial Standards Board (IFRS) taxonomy available. As a result, foreign private issuers under Securities Act Rule 405 that prepare their financial statements in accordance with IFRS as issued by the International Accounting Standards Board (IASB) may begin submitting their financial data in XBRL format with their first annual report on Form 20-F or 40-F for fiscal periods ending on or after December 15, 2017.

For more information, see our client alert available at: https://goo.gl/wcqCIn.

Exhibit Hyperlinks and HTML Format

On March 1, 2017, the SEC adopted amendments that require that registrants that file registration statements under the Securities Act and the Exchange Act and periodic reports under the Exchange Act subject to the exhibit requirements of Item 601 of Regulation S-K and FPIs that file Forms 20-F and F-10 include hyperlinks to each exhibit listed on the exhibit index in such filings. The amendments require that all filings be submitted in HTML format. The amendments become applicable to filings made after September 1, 2017. Registrants that are "smaller reporting companies" or that are neither "large accelerated filers" nor "accelerated filers" (i.e., "non-accelerated filers") and that make submissions in ASCII format, must comply with the new requirements by September 1, 2018. A phase-in period also will be applicable to certain securitization related filings made on Form 10-D. As discussed in August 2016 when these amendments were proposed, the objective is to facilitate investor access to exhibits.

Registrants will be required to include a hyperlink to each exhibit identified in the exhibit index, unless the exhibit is filed in paper pursuant to a temporary or continuing hardship exemption. The requirements are not applicable to any multi-jurisdictional disclosure system ("MJDS") forms or to Form 6-K. An active link must be included for each exhibit listed in the exhibit index and, if an exhibit is incorporated by reference, an active hyperlink to the exhibit separately filed on the SEC's EDGAR system. The amendments do not require that previously filed paper-only exhibits be re-filed.

Registration statements and reports subject to the exhibit filing requirements must be filed in HTML (not ASCII) format. Schedules or forms not subject to the exhibit filing requirements are not subject to the HTML requirement and may continue to be filed in ASCII format.

The amendments are available at: https://goo.gl/eVqGf9.

Final and Proposed FATCA Regulations

On December 30, 2016, the U.S. Internal Revenue Service ("IRS") published modifications to regulations under the Foreign Account Tax Compliance Act ("FATCA"). The regulations generally make technical changes to existing FATCA regulations and incorporate FATCA guidance that was previously issued by the IRS. For example, the regulations provide that no withholding on "foreign passthru payments" will be required until the later of January 1, 2019 or the date on which final regulations are published that define the term "foreign passthru payments." Similarly, withholdable payments under FATCA do not include gross proceeds from a sale of property occurring before January 1, 2019. Both of these provisions were contained in Notice 2015-66 and are now incorporated into the regulations.

For more information, see our TaxTalk Newsletter at: https://goo.gl/DNYvCm.

Repeal of Resource Extraction Disclosure Rule

On February 14, 2017, President Trump approved Congress' joint resolution to repeal the SEC's resource extraction disclosure rule.

That action effectively brings to a conclusion the SEC's efforts to implement a resource extraction disclosure rule mandated more than six years ago by the Dodd-Frank Act.

For additional discussion and analysis, read our client alert: https://goo.gl/HF8rbP.

CLIENT RESOURCE CORNER

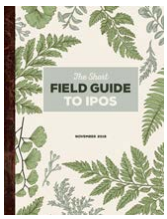
We have a number of resources available to our clients and friends including:

MoFo Jumpstarter.

Our Jumpstart blog is intended to provide entrepreneurs, domestic and foreign companies of all shapes and sizes, and financial intermediaries, with up to the minute news and commentary on the JOBS Act. Visit: www.mofojumpstarter.com

MoFo's Quick Guide to REIT IPOs.

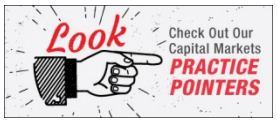
Our recently updated Quick Guide to REIT IPOs provides an overview of the path to an IPO for a REIT. The guide also addresses regulatory, tax and accounting considerations relevant to sponsors considering forming a REIT. Our guide is available here: https://goo.gl/jwrKE1.



The Short Field Guide to IPOs.

In our recently updated IPO Field Guide we provide an overview of the path to an initial public offering and address a number of recent developments. Our guide is available here: https://goo.gl/Cvxa4S.

Capital Markets Practice Pointers.



In our practice pointers, which address a range of topics of interest, we offer guidance on frequent issues encountered in connection with securities disclosures and filings. Visit our Practice Pointer webpage at https://goo.gl/FizH9N.

SOCIALLY AWARE THE SOCIAL MEDIA LAW UPDATE

Social media sites are transforming not only the daily lives of consumers, but also how companies interact with consumers. Social media generates new legal questions at a far faster pace than the law's ability to provide answers to such questions. In an effort to stay on top of these emerging issues, and to keep our clients and friends informed of new developments, Morrison & Foerster has launched a newsletter devoted to the law and business of social media. Visit www.mofo.com/sociallyaware.

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